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No. 91-489

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In The
Supreme Court of the United States
October Term, 1991

OMAHA INDIAN TRIBE,

Petitioner,

vs.

AGRICULTURAL AND INDUSTRIAL
INVESTMENT CO, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF FOR JOHN R. WILSON; RGP, INC., ET AL.
IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner, Omaha Indian Tribe (hereinafter "Tribe"), seeks review of the decision of the court of appeals in *Omaha Indian Tribe v. Tract I - Blackbird Bend Area*, 933 F.2d 1462 (CA8, 1991). The court of appeals decision affirmed the dismissal with prejudice of Tribe's quiet title action to lands located in Black Bird Bend, Monona Bend and Omaha Mission Bend outside the Barrett Survey. The district court's order was issued as a sanction pursuant to Federal Rules of Civil Procedure 16(f) and 41(b). The earlier history of this tortuous and

convoluted case can be found in the following reported opinions:

United States v. Wilson, 433 F. Supp. 67 (N.D. Iowa 1977); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978), *vacated and remanded*, 442 U.S. 653 (1979); *Omaha Indian Tribe, Treaty of 1854 with the United States v. Wilson*, 614 F.2d 1153 (8th Cir.), *cert. denied*, 449 U.S. 825 (1980); *United States v. Wilson*, 523 F. Supp. 874 (N.D. Iowa 1981); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert. denied*, 465 U.S. 1025 (1984); *United States v. Wilson*, 578 F. Supp. 1191 (N.D. Iowa 1984), *aff'd in part and rev'd in part*, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989); *United States v. Wilson*, 926 F.2d 725 (8th Cir. 1991); *Omaha Indian Tribe v. Tract I - Blackbird Bend Area, et al.*, 933 F.2d 1462 (8th Cir. 1991).

The land area involved is usually referred to in the opinions of the lower court as the unconsolidated portion of Tribe's case. None of the land in the unconsolidated portion of Tribe's case was ever part of the Tribe's original reservation. The Tribe's claims have therefore been deemed an action at law for ejectment.¹

The opinion of the Honorable Warren K. Urbom, United States District Judge for the District of Nebraska (App. E, p. 24a)² and the opinion of the of the Eighth

¹ 933 F.2d at p. 1465 (CA8, 1991)

² References to the Appendix to Tribe's Petition will be to the Appendix exhibit and page of the Appendix (App. __, p. __).

Circuit Court of Appeals (App. F, p. 40a) detail the history of the Tribe's refusal to provide meaningful discovery during the 28 month period from June 1987 until the date on which this case was set for trial, November 6, 1989. Suffice to say that the district court found that the Tribe had failed to file an acceptable proposed Pre-Trial Order including a failure to reveal adequately the testimony of its expert witnesses which showed a systematic pattern of failure to comply with court rules and court orders. (App. E, p. 37a). The Eighth Circuit concluded that the district court did not abuse its discretion in granting Defendants' motions to dismiss because the record supports the fact of Tribe's failure to comply with the court's orders and that said failure was intentional and willful and not inadvertent or accidental. (App. F, pp. 52a-53a).

The pattern of misconduct by the Tribe in both the consolidated and the unconsolidated cases has been persistent and well documented since 1985. The Tribe has been sanctioned eight times; the Tribe has been ordered to appear and show cause four times; the Tribe or its Tribal council have been held in contempt twice. A summary of the record of these instances is attached as an Appendix to this Brief as pages A-1 and A-2.

The unconsolidated case involves Tribe's claims to land outside the Tribal reservation boundaries in three bends along the Missouri River in Monona County, Iowa. Tribe claims the land was formed by accretion to the reservation because of movements of the Missouri River between 1867 and 1975. In order to prove this claim, Tribe must (1) prove the accretions to the reservation by the movements of the river and (2) that the Tribal land was

then "cut off" from the reservation by avulsions which left the accretions on the Iowa side of the river. The Tribe is not entitled to any presumption of title under 25 USC §194 because it cannot prove either prior title or prior possession.

Reference is made in earlier opinions to the Barrett Survey. This was a survey made by T. H. Barrett of the U.S. Land Office in 1867 which identified, at that time, the easterly boundary of the Tribe's reservation. None of the lands claimed in the unconsolidated case lie within the 1867 reservation boundary as surveyed by Barrett.³

Tribe now claims it has been denied Due Process. However its Petition for Certiorari concerns itself exclusively with allegations of fraud practiced upon it by certain lawyers in the U.S. Department of Justice, by District Court Judges McManus and Urbom and by Judge Lay of the Eighth Circuit. (Tribe's Petition for Certiorari, pp. 7-29). The alleged fraud arises from a complaint filed by the Department of Justice in C-75-4024, filed May 19, 1975, in the United States District Court for the Northern District of Iowa. That complaint is directed at certain lands only within Black Bird Bend and only within the original boundary of the reservation of the Omaha Indian Tribe as surveyed by Barrett in 1867. No fraud is or has ever been claimed as to the lands claimed by the Tribe in Monona Bend and Omaha Mission Bend because the complaint filed by the Department of Justice did not refer in any way to any of said lands. As a result of the complaint in C-75-4024, the United States and the Tribe prevailed as

³ 854 F.2d 1089, 1096, footnote 6 (CA8, 1988)

to 1900 acres of land originally within the reservation in Black Bird Bend.

REASONS FOR DENYING PETITION

SUMMARY OF ARGUMENT

Tribe's Petition for Writ of Certiorari is not filed pursuant to Rule 17 of the Rules of the Supreme Court of the United States. Rather, it is a petition to review a decision of the Eighth Circuit Court of Appeals. Tribe's Petition does not contain any showing of any special or important reasons for the granting of the Petition as required by Rule 10, Rules of the Supreme Court of the United States, nor does it characterize any reasons to grant the Writ under Rule 10(a), (b), or (c). Tribe simply realleges that fraud was perpetrated on it by the United States Department of Justice.

This is not the first time the Tribe has raised the "fraud" issue in a Petition for Writ of Certiorari to this court. On February 28, 1989, the Tribe filed its Petition for Writ of Certiorari which was docketed as No. 88-1426. Therein, it raised the identical fraud issue now raised in this Petition. Tribe's petition in No. 88-1426 was denied by this court in *Omaha Indian Tribe v. Jackson*, 490 U.S. 1090 (1989). Tribe's Petition for Writ of Certiorari in No. 88-1426 was from the opinion of the Eighth Circuit in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (1988). The court of appeals in its opinion in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (1988) refused to give any credence to the Tribe's fraud charges stating at p. 1092, footnote 4:

In this appeal, the Tribe also maintains (1) that the Department of Justice attorneys engaged in fraud and collusion in their representation of United States as trustee for the Tribe, . . . We find these claims to be without merit.

The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976. However, the Tribe failed to again raise the issue until 1985 even though the case had been reviewed once by the Supreme Court and three times by the Eighth Circuit. The district court had held that the Tribe's motion to disqualify the government attorneys was "clearly untimely and merits no serious attention or consideration". The Tribe subsequently petitioned the Eighth Circuit for a writ of mandamus alleging the same charges but that court not only dismissed the Tribe's petition as "frivolous and totally without merit" but also awarded the United States costs and attorney fees as sanctions against counsel for the Tribe for filing "a totally frivolous pleading". In *Re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (Order Denying Petition for Writ of Mandamus). In view of the foregoing, the Eighth Circuit unequivocally determined prior to oral argument that it would not entertain this meritless issue. *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089, 1092, footnote 4 (CA8, 1988).

The Tribe has been represented throughout this litigation by counsel of its own choice, largely at the expense of the Bureau of Indian Affairs. The Tribe filed its own Complaint in C-75-4067 on October 6, 1975 (App. K, p. 143a). Tribe's Complaint included all of the land encompassed by the Complaint filed by the Department of Justice together with considerably more land which was

outside the original reservation boundaries. The district court consolidated the claims in C-75-4024 with the Tribe's Complaint (the consolidated case) and that aspect of the case proceeded to trial with the Tribe's counsel actively participating at all stages. That portion of the litigation has been concluded by the earlier reported opinions.

Although these cases were filed in 1975, the charges of fraud were not raised by the Tribe in any of the appeals in connection with the consolidated case until the Tribe filed a motion on November 7, 1985, to have the attorneys for the United States disqualified.

The Tribe raises no constitutional issues by its claim of fraud practiced by the attorneys for the United States Justice Department. Its petition to this court simply contains a "Certificate" of its counsel in which he denies statements made about his conduct and labels them as "infamous, false and fabricated charges" and characterizes the opinion of the court of appeals as "replete with false statements and partial misstatements, . . .". (Tribe's Petition for Writ of Certiorari, p. 8).

In the unconsolidated portion of this case, Tribe's counsel has at all times been in charge of the progress of the litigation. It is clear from the circuit court opinion in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (CA 1988), *cert. denied*, 490 U.S. 1090 (1989) that:

1. The Tribe will have to carry the burden of proof in establishing its claims outside the Barrett Survey, since 25 U.S.C. §194 would not apply outside the Barrett Survey to shift the burden to the landowners.

2. There are landowners who, because of the severance order, did not participate in the trial of the Barrett Survey portion of this case and whose rights would be denied if the judgment in favor of the Tribe were extended outside the Barrett Survey.

3. The Barrett Survey portion of the case has proceeded as an equitable quiet title action. The Tribe's claims outside the Barrett Survey will be an action at law for ejectment and the affected landowners may have the right to trial by jury.⁴

Since the Petition for Writ of Certiorari from the opinion in *Omaha Indian Tribe v. Jackson* (CA8, 1988), was denied, that opinion has become the law of the case as it relates to proceedings in the unconsolidated portion of the Tribe's claims. *Little Earth of the United States, Inc. v. United States Department of Housing and Urban Dev.*, 807 F.2d 1433, 1440-41 (CA8, 1986) (Finding law of the case doctrine prevents relitigation of settled issues).

As the Eighth Circuit so aptly noted in its most recent opinion dismissing the Tribe's remaining claims:

" . . . In Tribe's brief, Mr. Veeder continues to exercise scurrilous disrespect for the judges involved in this case. He stands obsessed with the charges of fraud against the government and the complicity in such fraud by Judges McManus and Urbom. He maintains this charge notwithstanding this court's prior dismissal of such a claim, and he continues to inject this

⁴ 854 F.2d 1089, footnote 6, p. 1096.

claim into the overall merits of the ejectment action."⁵

CONCLUSION

There is nothing in this petition to warrant review by this court. There is no issue of federal law or its application which merits the attention of this court and therefore it is respectfully submitted that the Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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⁵ 933 F.2d at p. 1471 (CA8, 1991)



RECORD OF CONTUMACIOUS CONDUCT BY OMAHA
INDIAN TRIBE

Consolidated Cases

Date

- | | |
|----------|---|
| 08/02/85 | <u>Order</u> to members of Tribal council <u>to show cause</u> on Tribe's resistance to completion of survey. |
| 08/20/85 | Hearing on show cause. Tribe agreed to cease resistance to survey. |
| 02/26/86 | <u>Order granting sanctions</u> for Tribe's frivolous motion to disqualify Justice Department attorneys. |
| 08/25/86 | <u>Eighth Circuit granted sanctions</u> against Tribe for frivolous petition for Writ of Mandamus. |
| 10/10/86 | Order on defendants' motion for sanctions and to compel discovery. Order required Tribe to respond to damages interrogatories re Barrett Survey by 10/31/86. <u>Monetary sanctions granted.</u> |
| 12/01/86 | Order: Tribe's <u>damage claim</u> in consolidated cases <u>dismissed as sanction</u> for Tribe's failure to make discovery. |
| 04/01/87 | <u>Order</u> on 03/09 <u>show cause hearing</u> . The Tribe had denied the defendants' access to non-trust land. <u>Tribe enjoined</u> from interference and from <u>impeding survey</u> . |
| 04/17/87 | <u>Order</u> on 03/09 <u>show cause hearing</u> . <u>Tribe held in contempt</u> . <u>Money sanctions awarded</u> to Iowa. Court will consider further sanctions if Tribe continues to violate |

01/14/87 order granting defendants' possession.

04/22/87 Order for show cause hearing 05/01 on Tribe's continued violation of orders granting possession of non-trust land to defendants.

05/01/87 Show cause hearing held. Tribal council jailed for contempt but released when council passed resolution agreeing to obey orders.

05/22/87 Order granting monetary sanctions against Tribe and Doran Morris, Tribal Chairman, personally.

Unconsolidated Cases

01/26/89 Order against Tribe compelling discovery.

03/24/89 Order requiring Tribe to comply with discovery.

06/06/89 Order granting sanctions for Tribe's failure to make discovery.

09/29/89 Order requiring dismissal if pretrial order not submitted by 10/16/89.

05/07/90 Order granting sanctions for Tribe's failure to file a proposed pre-trial order. (App C, pp. 18a-23a)
